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No. 98-822

In the Supreme Court of the United States

FRIENDS OF THE EARTH, INC., ET AL., PETITIONERS

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a citizen suit under Section 505 of the Clean Water Act, 33 U.S.C. 1365, must be dismissed as moot unless the district court orders injunctive relief.

2. Whether a citizen plaintiff is barred from recovering litigation costs under Section 505(d) of the Clean Water Act if the citizen suit is dismissed as moot.

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INTEREST OF THE UNITED STATES

The United States, in cooperation with the individual States, has primary responsibility for implementing and enforcing the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.* The United States is also a potential defendant in citizen enforcement actions against federal facilities. See CWA § 309, 33 U.S.C. 1319. The present case, in which the United States participated as amicus curiae before the district court and the court of appeals, concerns the ability of citizen plaintiffs to recover civil penalties for violations of the Act and the costs of litigation for successful enforcement actions. Its resolution will have a direct and substantial effect on enforcement of the Act.

STATEMENT

Section 505 of the Clean Water Act, 33 U.S.C. 1365, authorizes private citizens to bring civil actions to

enforce the Act's requirements. Petitioners Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and the Sierra Club brought this citizen suit against respondent Laidlaw Environmental Services, Inc., to enjoin Laidlaw's violations of its Clean Water Act permit. The district court found that Laidlaw had violated its permit both before and after petitioners filed their citizen suit, but had ceased the violations before final judgment. The court declined to issue an injunction but assessed civil penalties and indicated that it would award petitioners their costs of litigation in accordance with Section 505(d) of the Act. See 33 U.S.C. 1365(d). The court of appeals reversed and directed the district court to dismiss the citizen action. The court reasoned that "this action is moot because the only remedy currently available to [petitioners]—civil penalties payable to the government—would not redress any injury [petitioners] have suffered." Pet. App. 8a-9a. The court of appeals also stated that petitioners are not entitled to recover their costs of litigation because they are not "prevailing or substantially prevailing part[ies]" within the meaning of Section 505(d).

A. The Clean Water Act

The Clean Water Act creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. 1251(a). As a part of that program, Section 301(a) of the Act prohibits all discharges of pollutants into navigable waters except those made in compliance with the Act. Section 402 of the Act establishes the National Pollutant Discharge Elimination System (NPDES), which authorizes the federal government and qualifying States to issue permits for controlling the point-source discharge of pollutants. See 33 U.S.C. 1311(a), 1342.

Section 402(a) provides that the Environmental Protection Agency (EPA) shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. 1342(a). Section 402(b) and (c) authorizes the States to develop and administer their own NPDES permit programs and provides that EPA shall suspend issuance of federal permits upon determining that a State has adopted an adequate program. 33 U.S.C. 1342(b) and (c). If an NPDES permit holder fails to comply with the specified permit conditions, the federal and state governments may take enforcement action. CWA §§ 309, 402(b)(7), 33 U.S.C. 1319, 1342(b)(7). Section 309 of the Clean Water Act provides for a variety of government enforcement measures, including the issuance of compliance orders, 33 U.S.C. 1319(a), the initiation of civil actions for injunctive relief, 33 U.S.C. 1319(b), and the imposition of criminal, civil, and administrative penalties, 33 U.S.C. 1319(c)-(g).

Section 505 provides for citizen enforcement of the Act. See 33 U.S.C. 1365. As relevant here, Section 505(a)(1) provides that "any citizen may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of * * * an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a)(1).[1] Section 505(b) generally bars a citizen from suing until 60 days after the citizen gives

[1] A "citizen" means "a person or persons having an interest which is or may be adversely affected." CWA § 505(g), 33 U.S.C. 1365(g), and an "effluent standard or limitation" includes a state NPDES "permit or condition thereof," CWA § 505(f), 33 U.S.C. 1365(f).

notice of the alleged violation to EPA, the relevant State, and the alleged violator, 33 U.S.C. 1365(b)(1)(A). Section 505(b) also bars a citizen from suing if EPA or the State has already commenced and is "diligently prosecuting" an enforcement action. 33 U.S.C. 1365(b)(1)(B).[2]

Once the citizen files a suit, Section 505(c) directs that the citizen must serve a copy of the complaint on the Attorney General and the Administrator of EPA, and the citizen must provide them with advance notice of any proposed consent judgment. CWA § 505(c)(3), 33 U.S.C. 1365(c)(3). The district court is empowered to enforce permit requirements and assess civil penalties, which are payable to the United States Treasury. See CWA § 505(a), 33 U.S.C. 1365(a). Furthermore, the court, "in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." CWA § 505(d), 33 U.S.C. 1365(d).

B. The District Court Proceedings

Laidlaw operated a hazardous waste incineration facility in Roebuck, South Carolina. The facility included a wastewater treatment plant that removed pollutants from water generated by the facility's air pollution control system. Laidlaw discharged the treated wastewater into the North Tyger River. In 1986, the State of South Carolina, which administers a federally approved NPDES permit program through

[2] The citizen may intervene in the government enforcement action. See CWA § 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B). If the United States has not filed its own action, it may intervene in the citizen action. See CWA § 505(c)(2), 33 U.S.C. 1365(c)(2).

the State's Department of Health and Environmental Control (DHEC), issued a NPDES permit for Laidlaw's wastewater treatment plant. The NPDES permit limited Laidlaw's discharges of numerous pollutants and required Laidlaw to monitor and report its discharges. In particular, the permit, at that time, limited Laidlaw to a daily average maximum discharge of 1.3 parts per billion (ppb) of mercury. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 593-594 (D.S.C. 1997) (*Laidlaw II*) (J.A. 141-143); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 475 (D.S.C. 1995) (*Laidlaw I*) (J.A. 86-87).

Between 1987 and 1991, Laidlaw violated the mercury limitation contained in its NPDES permit 363 times. *Laidlaw II*, 956 F. Supp. at 600, 613-619 (J.A. 158, 185-193). Laidlaw installed additional pollution control technology in 1991, but nevertheless violated the mercury limitation more than 100 times in 1992. *Id.* at 595, 619-621 (J.A. 147, 193-195). On April 10, 1992, petitioners notified Laidlaw of their intention to bring a citizen suit under Section 505 of the CWA. *Laidlaw I*, 890 F. Supp. at 477 (J.A. 91). Laidlaw promptly entered into a consent agreement with DHEC, drafted and filed a complaint on behalf of DHEC, and sought state court approval of the settlement. The state court approved the settlement on June 10, 1992, the day after the expiration of Section 505(b)'s 60-day notice period, 33 U.S.C. 1365(b). See 890 F. Supp. at 477, 478-479 (J.A. 91, 93-95). Laidlaw undertook those steps to interpose a bar to the citizen suit under Section 505(b)'s "diligent prosecution" provision, 33 U.S.C. 1365(b)(1)(B). See *Laidlaw I*, 890 F. 2d at 478-479 (J.A. 93-94). Laidlaw also continued to explore technology to curtail the mercury violations. *Id.* at 478 (J.A. 92-93).

On June 12, 1992, petitioners brought suit against Laidlaw, seeking injunctive and declaratory relief and an award of civil penalties for Laidlaw's continuing violations of its NPDES permit. Laidlaw raised its "diligent prosecution" defense, and the district court heard seven days of testimony on the matter. The court then requested and received, through a brief amicus curiae, the views of the United States on that issue. The court rejected Laidlaw's diligent prosecution defense after an extensive analysis of the substance of the settlement and the circumstances by which it was reached. *Laidlaw I*, 890 F. Supp. at 484-499 (J.A. 106-136).

The court next conducted a trial on petitioners' complaint, but the court delayed issuance of its decision in light of administrative proceedings respecting Laidlaw's permit. *Laidlaw II*, 956 F. Supp. at 596-597 (J.A. 149). The court ultimately found that Laidlaw had violated the permit's mercury limitation 489 times, including nine times after petitioners filed their complaint. *Laidlaw II*, 956 F. Supp. at 600-601 (J.A. 158); see also *id.* at 613-621 (J.A. 185-195). The court also found that Laidlaw had committed 420 monitoring violations, including 13 post-complaint violations, and that Laidlaw had committed 503 reporting violations, including ten post-complaint violations. *Id.* at 600-601 (J.A. 159).

The district court evaluated the Clean Water Act's criteria for imposing civil penalties (CWA § 309(d), 33 U.S.C. 1319(d)), and it assessed a penalty of $405,800. See *Laidlaw II*, 956 F. Supp. at 601-610 (J.A. 159-181). The court noted that the penalty amounted to less than one half of the economic benefit that Laidlaw had obtained through non-compliance, but it concluded that the "total deterrent effect" was adequate, because

"Laidlaw will be required to reimburse [petitioners] for a significant amount of legal fees and has, itself, incurred significant legal expenses." *Id.* at 610-611 (J.A. 181-182). The court refused to grant petitioners' request for injunctive relief, reasoning that an injunction was inappropriate because "Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992." *Id.* at 611 (J.A. 183).

C. The Court of Appeals' Decision

Petitioners appealed solely on the ground that the district court's penalty was inadequate, and Laidlaw cross-appealed on the grounds that petitioners lacked standing to bring the suit and that the district court had improperly rejected Laidlaw's diligent prosecution defense. Pet. App. 4a. The court of appeals did not reach any of those issues and instead concluded, after supplemental briefing, that the case was non-justiciable as a constitutional matter because the action had become moot. *Id.* at 5a.

The court observed that the Constitution's "Case[]" or "Controvers[y]" requirement, U.S. Const. Art. III, is enforced through the concept of standing, which requires plaintiffs to demonstrate that they have suffered an injury in fact, caused by the defendant's action, that can be redressed through a favorable decision. Pet. App. 6a. The court stated that "these elements must continue to exist at every stage of review" or else "the action becomes moot." *Ibid.* The court of appeals specifically "focus[ed] on the continued existence of the third element, redressability." *Id.* at 7a.[3]

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[3] The court of appeals "assume[d] without deciding that [petitioners] had standing to initiate this action and have proven a continuous injury in fact." Pet. App. 7a n.3.

The court of appeals noted that the district court had denied injunctive relief and, instead, assessed civil penalties, which are payable to the United States Treasury. Pet. App. 7a. Citing this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), the court of appeals concluded that "this action is moot because the only remedy currently available to [petitioners]—civil penalties payable to the government—would not redress any injury [petitioners] have suffered." Pet. App. 8a-9a. The court accordingly vacated the district court's decision and remanded with instructions to dismiss the action. The court additionally instructed that petitioners are not entitled to recover their litigation costs because they failed to prevail on the merits and therefore are not a "prevailing or substantially prevailing party" within the meaning of Section 505(d) of the Clean Water Act. *Id.* at 9a n.5 (quoting CWA § 505(d), 33 U.S.C. 1365(d)).

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that a Clean Water Act citizen suit, brought to compel a regulated entity to comply with its NPDES permit, must be dismissed as moot if the district court concludes that injunctive relief is unwarranted. The court's ruling rests on a mistaken understanding of the Clean Water Act's citizen-enforcement provisions, CWA § 505, 33 U.S.C. 1365, and this Court's jurisprudence respecting Article III's case-or-controversy requirement.

A. This Court ruled in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that Section 505 authorizes citizens to bring citizen suits to compel compliance with the Clean Water Act, but not to sue merely to punish past violations. The Court has since indicated in *Steel Co.* v. *Citizens*

for a Better Environment, 523 U.S. 83 (1998), that a private citizen would lack constitutional standing to bring a suit solely to assess civil penalties for past infractions. In this case, petitioners commenced suit to compel compliance from an entity that was in violation of its permit requirements at the time the suit was brought but that had discontinued its violations before the court entered judgment. The question, for purposes of Article III's case-or-controversy requirement, is whether petitioners' claim for relief presented a live controversy under the principles that this Court has established for determining mootness.

B. This Court applies the mootness doctrine to determine whether circumstances have changed during the course of the litigation so as to eliminate the case or controversy that the plaintiff had previously shown to exist. In answering that question, the Court has established the principle that a defendant's mere voluntary cessation of unlawful conduct does not moot a case. See, *e.g.*, *City of Mesquite* v. *Alladin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982). Instead, the defendant must show that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 289 n.10 (citations omitted). The Court has indicated that those mootness principles apply to Clean Water Act citizen suits. *Gwaltney*, 484 U.S. at 66-67.

C. The court of appeals erred in failing to apply the Court's teachings in *City of Mesquite* and other decisions, which establish that a defendant's mere voluntary cessation of unlawful conduct does not automatically moot a case. The court of appeals based its determination of mootness on the fact that the district court did not provide injunctive relief. The district court had denied injunctive relief, however, as a matter of

remedial discretion and not because the case satisfied this Court's criteria for mootness. As this Court indicated in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the Clean Water Act provides other remedies, including civil penalties, to compel compliance. The district court did not find that there was no reasonable prospect of future violations; it therefore could assess civil penalties, as an alternative to an injunction, to deter future violations and redress the injuries that prompted petitioners' suit.

D. Because the court of appeals erred in concluding that the district court's decision to withhold injunctive relief rendered petitioners' citizen suit moot, there is no occasion for this Court to review the court of appeals' suggestion that a finding of mootness would preclude petitioners from recovering their costs of litigation. See CWA § 505(d), 33 U.S.C. 1365(d). Under this Court's normal practice, the case should be remanded for resolution of the remaining issues that the court of appeals did not reach. Although the court of appeals appears wrong in suggesting that petitioners are not entitled to recover their litigation costs, that matter should be addressed, if it becomes necessary, through the proceedings on remand.

ARGUMENT

The Court of Appeals Erred In Holding That A Citizen Suit Must Be Dismissed As Moot Unless The Citizen Plaintiff Obtains Injunctive Relief

The court of appeals' ruling that petitioners' citizen suit is moot rests on a misunderstanding of the Clean Water Act's citizen-enforcement provisions and this Court's mootness jurisprudence. We begin by explaining the content and objectives of the citizen-enforcement provisions. We next address how this Court's

mootness doctrine operates in the context of those provisions. Finally, we show why the court of appeals erred in holding that, because the district court denied injunctive relief, the petitioners' enforcement action is moot.[4]

A. The Clean Water Act's Citizen-Suit Provisions Authorize Private Judicial Actions To Compel Dischargers To Comply With Their Discharge Permits

The Clean Water Act, like other federal environmental statutes, creates a federal-state partnership for developing environmental standards and providing for their enforcement. Among other things, the Act prohibits a facility from discharging pollutants into navigable waters unless the facility obtains a NPDES permit, which, among other things, establishes limits on the amounts of certain pollutants that may be discharged. See CWA § 402(a)(1), 33 U.S.C. 1342(a)(1); 40 C.F.R. Pt. 122; pp. 2-3, *supra*. An NPDES permit also typically imposes monitoring and reporting obligations, which require the facility to measure its discharges at prescribed times and document those measurements through publicly available discharge monitoring reports (DMRs). See CWA § 402(a)(2), 33 U.S.C. 1342(a)(2); 40 C.F.R. 122.41(j) and (*l*).

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[4] In the proceedings below, Laidlaw also contested petitioners' standing to bring suit. Like the court of appeals (see note 3, *supra*), we assume, for purposes of resolving the mootness question, that Laidlaw's permit violations have caused petitioners injury in fact. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66-67 (1997) (courts may assume that standing exists to resolve whether a case has nevertheless become moot). If the Court concludes that petitioners' suit is not moot, the issue of petitioners' standing would be resolved on remand. See pp. 28-30, *infra*.

Like most States, South Carolina has obtained EPA's approval to issue and enforce NPDES permits. See CWA § 309(b) and (c), 33 U.S.C. 1342(b) and (c); 40 C.F.R. 123.1 *et seq.* EPA, as well as the issuing state agency, may enforce a state-issued NPDES permit. See CWA §§ 309(a), 402(b)(7), 33 U.S.C. 1319(a), 1342(b)(7). Congress and state legislatures have empowered those governmental entities to call upon a variety of mechanisms—including administrative penalties, judicial injunctions and civil penalties, and criminal sanctions—to compel a facility to comply with its permit and to punish permit violations. See CWA § 309(a)-(g), 33 U.S.C. 1319(a)-(g); see also 40 C.F.R. 123.27. Nevertheless, Congress has recognized, in light of the sheer size of a water pollution program requiring a permit for every point-source discharge in the Nation, that the federal and state governments cannot adequately enforce the NPDES permit program without citizen cooperation and assistance. Congress accordingly enacted Section 505 of the Clean Water Act, which empowers citizens who are adversely affected by permit violations to bring civil enforcement actions to compel compliance. See 33 U.S.C. 1365.

This Court ruled in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that Section 505 allows citizens to commence citizen suits to compel compliance with the Clean Water Act, but not to sue merely to punish past infractions. The Court reasoned that Section 505(a)(1), which authorizes a citizen to sue persons "alleged to be in violation" of permit requirements (33 U.S.C. 1365(a)(1)), allows the citizen to commence suit in response to "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57. But the citizen,

unlike the federal or state government, may not bring suit simply to assess civil penalties for "wholly past violations." *Ibid.* The citizen "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Id.* at 59.

This Court's decision in *Gwaltney* rested on a determination that Congress intended to authorize citizens to initiate suit only to abate violations and compel compliance. See 484 U.S. at 59-63. The Court has since indicated in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), a case involving the citizen-suit provisions of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. 11046(a)(1), that a citizen plaintiff would lack constitutional standing to bring a citizen suit solely to assess civil penalties (payable to the government) for wholly past violations. The citizen plaintiffs in *Steel Co.* brought a citizen suit against an industrial facility that had violated EPCRA's requirements but came into compliance before the citizens filed their complaint. The citizens argued that their suit could nevertheless proceed because EPCRA, unlike the Clean Water Act, authorized citizens to obtain a judicial assessment of civil penalties for past infractions. See 523 U.S. at 86-88. The Court ruled that, even if EPCRA authorized a citizen to sue for wholly past violations, the citizens' suit must be dismissed because the citizens lacked Article III standing to seek relief that does not redress a cognizable "injury in fact" to the citizens. *Id.* at 102-110.

The Court explained that "the irreducible constitutional minimum of standing" consists of the "triad of injury in fact, causation, and redressability," which "constitutes the core of Article III's case-or-controversy requirement." 523 U.S. at 102-104. A citizen

plaintiff that simply seeks civil penalties to punish the defendant for past infractions cannot satisfy the redressability requirement because, in that situation, a payment of civil penalties to the United States Treasury does not redress any injury that the citizen suffered from the defendant's past conduct. *Id.* at 106-107. The Court expressed no doubt that the federal or state governments could bring suit to punish past violations, but a private citizen could not sue to impose civil penalties unless that relief "would likely remedy its alleged injury in fact." *Id.* at 109.

In this case, unlike *Gwaltney* and *Steel Co.*, it is clear that, even after the citizen plaintiffs filed suit, the defendant continued to violate environmental requirements. Compare *Laidlaw II*, 956 F. Supp. at 600-601 (J.A. 158), with *Steel Co.*, 523 U.S. at 88, and *Gwaltney*, 484 U.S. at 55. Nevertheless, the district court found that, within two months after petitioners filed their complaint, Laidlaw was in "substantial compliance." 956 F. Supp. at 611 (J.A. 183). The district court assessed civil penalties and attorneys fees to "provide adequate deterrence under the circumstances of this case," *ibid.* (J.A. 182), but it refused to issue an "injunction or other form of equitable relief" in light of "the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit," *ibid.* (J.A. 183).

The court of appeals concluded that the district court's refusal to provide injunctive relief had critical constitutional implications. It ruled, based on an extrapolation of this Court's decision in *Steel Co.*, that the district court's denial of petitioners' request for an injunction rendered this case constitutionally moot and prohibited the district court from assessing civil penalties. Pet. App. 7a-9a. As we next explain, the court's

ruling overlooks established principles that guide how the mootness doctrine should be applied in this case.

B. A Defendant's Voluntary Cessation Of Permit Violations Does Not Moot A Citizen Suit Unless The Defendant Demonstrates That The Permit Violations Will Not Recur

The constitutional doctrines of standing and mootness each originate from Article III's specification that the "judicial Power" extends only to "Cases" or "Controversies." U.S. Const. Art. III, § 2. The doctrine of standing requires a court to ascertain that a plaintiff has demonstrated an "injury in fact," caused by the defendant's allegedly unlawful action, that can be redressed through the requested relief. See, *e.g.*, *Steel Co.*, 523 U.S. at 102-104; *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). The doctrine of mootness, by contrast, requires a court to discontinue its exercise of judicial power if it determines that a live case or controversy no longer exists in light of changed circumstances. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

The doctrines of standing and mootness are closely related because each inquires into the existence of an Article III case or controversy. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Indeed, this Court has suggested that mootness might be described as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Official English*, 520 U.S. at 68 n.22 (quoting *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980), and Henry P. Monaghan, *Constitutional Adjudication: The*

Who and When, 82 Yale L. J. 1363, 1384 (1973)). Nevertheless, the Court has treated the doctrines of standing and mootness as separate jurisdictional concepts and subjected them to different standards because of the distinct role that each plays, as a practical matter, in the conduct of litigation.

The Court applies the doctrine of standing as a threshold jurisdiction requirement that a plaintiff must normally satisfy to invoke the federal judicial power. See *Steel Co.*, 523 U.S. at 88-89. Because Article III's case-or-controversy requirement subsists "through all stages of federal judicial proceedings," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990), the plaintiff must be prepared to establish the requisites of injury in fact, causation, and redressability at each juncture where they may be called into question. The plaintiff must allege sufficient facts in the complaint to demonstrate standing. And if those allegations are disputed, the plaintiff must be prepared to come forward with sufficient evidence to withstand a motion for summary judgment and to prove those facts at trial. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 561; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-889 (1990); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 114-115 & n.31 (1979).

The Court applies the doctrine of mootness to assess whether circumstances have changed during the course of the litigation so as to eliminate the case or controversy that the plaintiff had previously shown to exist. See *Arizonans for Official English*, 520 U.S. at 67-68. In general, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *E.g.*, *County of Los Angeles*, 440 U.S. at 631. A dispute may become moot as a result of changes in the underlying facts, see, *e.g.*,

Mosley v. *United States*, 119 S. Ct. 484 (1998) (per curiam) (death of the defendant mooted review of his criminal conviction); *Vitek* v. *Jones*, 436 U.S. 407 (1978) (grant of parole may moot prisoner's challenge to conditions of confinement), or the controlling law, see, *e.g.*, *United States* v. *Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (per curiam) (vacating decision for determination of mootness); see also *United States Dep't of Justice* v. *Provanzano*, 469 U.S. 14 (1984) (congressional enactment mooted one issue but not the entire case).

The application of mootness principles frequently calls for a practical assessment of whether a case or controversy persists in light of the particular facts at hand. See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (evaluating whether challenged conduct is "capable of repetition, yet evading review"); *Geraghty*, 445 U.S. at 400 (noting, in the class action context, the "flexible character of the Article III mootness doctrine"); see also *Honig* v. *Doe*, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring). See generally Robert L. Stern, et al., *Supreme Court Practice* 710-721 (7th ed. 1993) (collecting cases and secondary sources). The Court has applied mootness principles in a practical manner when defendants facing injunctive remedies urge that their voluntary cessation of allegedly unlawful actions renders the case moot. This Court has repeatedly and emphatically rejected the notion that "voluntary cessation" of the challenged conduct automatically deprives a court of the power to order relief. See, *e.g.*, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982); *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

The Court's decisions have established the hornbook principle that "[m]ere voluntary cessation of allegedly illegal conduct, or a statement by the defendant that it would be uneconomical to engage in any further questioned behavior, does not render moot a suit for an injunction if it is possible for the defendant to resume such conduct." Stern, *supra*, at 716; see *id.* at 716 n.21 (collecting cases). As the Court has explained:

> "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'"

City of Mesquite, 455 U.S. at 289 n.10 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203, and *W.T. Grant Co.*, 345 U.S. at 632). Rather, "[t]he test for mootness in cases such as this is a stringent one." *Ibid.* The defendant must show that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203). Accord *W.T. Grant Co.*, 345 U.S. at 633 (the defendant bears the "heavy" burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated").

The Court has explained that voluntary cessation "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." *City of Mesquite*, 455 U.S. at 289. Accord *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203-204 (a defendant is entitled to show "that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary") (citing *W.T. Grant Co.*, 345 U.S. at 636). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). Nevertheless, the determination of whether injunctive relief is warranted is a matter within the trial court's discretion. *City of Mesquite*, 455 U.S. at 289 n.10.

This Court has recognized that the foregoing principles governing mootness are directly applicable to Clean Water Act citizen suits. See *Gwaltney*, 484 U.S. at 66-67 (quoting *Concentrated Phosphate Export Ass'n*, *W.T. Grant Co.*, and *Oregon State Med. Soc'y*, *supra*). The court of appeals erred in this case by failing to take those principles into account. Specifically, the court of appeals incorrectly concluded that the district court's discretionary decision to withhold injunctive relief in the face of Laidlaw's post-complaint cessation of its permit violations necessarily rendered petitioners' enforcement action moot.

C. A Court's Decision To Withhold Injunctive Relief Does Not Constitute A Finding That The Discharger's Violations Will Not Recur

The court of appeals concluded that petitioners' citizen suit was necessarily moot because the district court refused to grant an injunction in light of Laidlaw's cessation of its permit violations and "the only remedy currently available to [petitioners]—civil penalties payable to the government—would not redress any injury [petitioners] have suffered." Pet. App. 8a-9a. The court of appeals' exclusive focus on what relief the citizen received departs from the methodology that courts normally apply in analyzing mootness. More-

over, even if the court of appeals' methodology were proper, its analysis overlooks the relationship between injunctive relief and civil penalties under the Clean Water Act, which would be an essential consideration in evaluating whether petitioners' citizen suit against Laidlaw is indeed moot.[5]

The court of appeals should have begun by applying this Court's teachings that a defendant's voluntary cessation of unlawful conduct does not automatically moot a case. See pp. 15-19, *supra*. Indeed, under those principles, Laidlaw was required to "demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Gwaltney*, 484 U.S. at 66 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203) (emphasis added by the Court in *Gwaltney*).

The district court did not treat petitioners' claims against Laidlaw as moot. It apparently saw no need to invoke the foregoing mootness principles, and it did not make specific findings on the question whether it was clear that Laidlaw's permit violations could not reasonably be expected to recur. The district court did deny petitioners' request for injunctive relief, which would have gone beyond a simple prohibitory injunction and imposed special reporting obligations. *Laidlaw II*, 956 F. Supp. at 611 (J.A. 182-183). But the court denied injunctive relief as a matter of equitable discretion, treating Laidlaw's compliance history as a factor bearing on the exercise of that discretion. *Ibid.* (J.A. 182-183). Specifically, the court stated that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief." *Ibid.* (J.A. 182-183). The court concluded that "the fact that Laidlaw is now and has for an extended time been in compliance with its permit" supported its decision that "no injunction or other form of equitable relief is appropriate." *Ibid.* (J.A. 183).

The district court's statements respecting the appropriateness of equitable relief do not provide what a determination of mootness would require: a definitive finding that it is absolutely clear there is no reasonable prospect that Laidlaw would repeat its violations. See *Gwaltney*, 484 U.S. at 66-67. A district court can properly conclude that the prospect of recurrence is not so small as to moot a case, but is sufficiently unlikely to warrant denial of injunctive relief. See, *e.g.*, *W.T. Grant Co.*, 345 U.S. at 633, 635-636 ("although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief"); see generally *City of Mesquite*, 455 U.S. at 289. Indeed, that is what the district court apparently concluded here. The court imposed civil penalties expressly to "provide adequate deterrence" of future violations. *Laidlaw II*, 956 F. Supp. at 610-611 (J.A. 181-182). But it nevertheless denied injunctive relief,

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[5] The courts of appeals, other than the Fourth Circuit, have concluded under various rationales that a citizen plaintiff who proves that the defendant was in violation of a NPDES permit at the time of suit may obtain civil penalties to deter future violations, even if the violations by that time ceased. See *Comfort Lake Ass'n* v. *Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Found., Inc.* v. *Stroh Die Casting, Inc.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Resources Defense Council* v. *Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 502 (3d Cir. 1993); *Atlantic States Legal Found., Inc.* v. *Pan Am. Tanning*, 993 F.2d 1017, 1020-1021 (2d Cir. 1993); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990); *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986). See also *Carr* v. *Alta Verde Indus., Inc.*, 931 F.2d 1055, 1065 n.9 (5th Cir. 1991) (dictum).

stating that Laidlaw need not demonstrate "no chance of a future permit violation" to defeat petitioners' request for an injunction. *Id.* at 611 (J.A. 183).

We believe that the district court's actions demonstrate its understanding that petitioners' citizen suit continued to present a live controversy under the standards set out in *Gwaltney*. But if the court of appeals nevertheless believed that Laidlaw's "voluntary" compliance, by itself, may have eliminated any reasonable prospect of future violations, then the court of appeals should have remanded the case to the district court for an express finding on that matter. See, *e.g.*, *Vitek*, 436 U.S. at 410 (remanding case to the district court for consideration of the question of mootness); *McLeod* v. *General Elec. Co.*, 385 U.S. 533, 535 (1967) (directing that "the District Court should determine in the first instance the effect of an intervening event upon the appropriateness of injunctive relief"); Stern, *supra*, at 257. The court of appeals should not have based a determination of mootness on the mere fact that the district court imposed civil penalties but did not provide injunctive relief.

A district court does not necessarily transgress Article III's case-or-controversy limitation by resolving a Clean Water Act citizen suit through the imposition of civil penalties as the sole form of relief. A citizen who is aggrieved by permit violations has standing to sue to enforce the permit and thereby abate those violations. See *Gwaltney*, 484 U.S. at 65-66; *id.* at 70 (Scalia, J., concurring in part and dissenting in part). The citizen may obtain enforcement through an injunction that compels compliance. See CWA § 505(a), 33 U.S.C. 1365(a); *W.T. Grant Co.*, 345 U.S. at 633 ("The purpose of an injunction is to prevent future violations."). But as this Court explained in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the Clean Water Act does not employ injunctions as "the only means of ensuring compliance." *Id.* at 314.

In *Romero-Barcelo*, citizens demanded an injunction to abate government discharges of ordnance, which qualified as a pollutant under the Clean Water Act. This Court concluded that the Clean Water Act does not "deny courts the discretion to rely on remedies other than an immediate prohibitory injunction." 456 U.S. at 316. Rather, the Court concluded that the Clean Water Act gives a court discretion to choose relief "that will achieve *compliance* with the Act." *Id.* at 318. That relief "can include, but is not limited to, an order of immediate cessation." *Id.* at 320. As Section 505(a) makes clear, a citizen may ask the district court to "apply any appropriate civil penalties under [Section 309(d), 33 U.S.C. 1319(d)]" to deter future violations. 33 U.S.C. 1365(a). See *Romero-Barcelo*, 456 U.S. at 314.[6]

The court of appeals concluded that the district court's award of civil penalties, without an injunction, dictated that the case was moot, because civil penalties —which are payable to the Treasury—"would not redress any injury [petitioners] have suffered." Pet. App. 9a. The court of appeals overlooked that peti-

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[6] Section 309(d) sets forth standards for a district court to apply in assessing civil penalties in government enforcement actions. It directs that the court may impose a maximum penalty of $25,000 per day of violation and that, when assessing the penalty, the court shall consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. 1319(d).

tioners brought this citizen suit to compel Laidlaw to cease permit violations that, at the time the suit was filed, were allegedly causing petitioners injury in fact. If Laidlaw had failed to meet its "heavy" burden of showing that "there is no reasonable expectation that the wrong will be repeated," *Gwaltney*, 484 U.S. at 66, then the citizen suit was not moot, and the district court could impose relief to ensure future compliance. As this Court indicated in *Romero-Barcelo*, the court was entitled to employ civil penalties, rather than an injunction, to deter future violations and ensure continued compliance. See 456 U.S. at 314. It would deny that flexibility and exalt form over substance to require the district court to add a *pro forma* injunction order in order to avoid mootness.

By authorizing citizens to seek civil penalties, Congress intended to provide citizens with an additional means of compelling compliance through the specific deterrent force of a monetary sanction. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975) ("If [violators] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."). As this Court recognized in *Gwaltney*, the primary function of the citizen-suit provisions is to compel compliance with the law, 484 U.S. at 59-63, and it is therefore reasonable to conclude that Congress provided for "appropriate civil penalties" (33 U.S.C. 1365(a)) in citizen suits specifically to facilitate that objective. Congress empowered the government to seek civil penalties to punish wrongful conduct as well as to deter future violations, both of which are proper government objectives. *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987). Congress's authorization of civil penalties in citizen suits, however, is properly viewed as limited to the "forward-looking" objective of deterring the defendant from further non-compliance. *Gwaltney*, 484 U.S. at 59. [7]

Civil penalties are an effective "forward-looking" remedy because a coercive monetary sanction allows the court to compel compliance through a mechanism that directly removes the economic incentives that could induce a defendant "to return to his old ways." *City of Mesquite*, 455 U.S. at 289 n.10. The coercive effect of that sanction can be calibrated to respond to the likelihood of future violations. The district court in this case expressly applied civil penalties in that manner for the specific purpose of deterrence. See *Laidlaw II*, 956 F. Supp. at 610-611 (J.A. 181-182). Indeed, the lower courts, which have practical experience with the effectiveness of particular remedies, have concluded that civil penalties are an effective deterrent for Clean Water Act violations. See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *Southwest Marine, Inc.*, 28 F. Supp. 2d 584 (S.D. Cal. 1998); see also *Natural Resources Defense Council, Inc.* v. *Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 503 n.9 (3d Cir. 1993).

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[7] Congress drafted Section 309(d)'s standards for assessing civil penalties (see note 6, *supra*) with deterrence of violations specifically in mind. Section 309(d) makes express reference to setting penalties in light of the "the economic benefit (if any) resulting from the violation." 33 U.S.C. 1319(d). Congress drew that factor, as well as others, from EPA's pre-existing civil penalty policy. See *Tull*, 481 U.S. at 422 n.8. EPA's policy expressly stated that a core objective of civil penalties is to deprive the defendant of the economic benefit of the violation in order to provide effective deterrence. See *EPA Civil Penalty Policy* (1984), *reprinted in Implementation of the Federal Clean Water Act: Hearings on H.R. 81 Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transp.*, 98th Cong., 2d Sess. 531, 536 (1984).

The civil penalty remedy is also a useful alternative to an injunction because, if the court concludes that an assessment of civil penalties will effectively deter future violations, then the court will not need to engage in the potentially cumbersome role of supervising the defendant's future compliance through an ongoing injunction. In addition, if the defendant knows that it faces the prospect of civil penalties as well as an injunction, it will not have an incentive to engage in "dilatory tactics" to prolong the litigation in the hope of eliminating the need for an injunction and then claiming that the citizen's claim for assessment of the accumulated civil penalties is moot. See *Atlantic States Legal Found., Inc.* v. *Pan Am. Tanning*, 993 F.2d 1017, 1021 (2d Cir. 1993); see also *Comfort Lake Ass'n* v. *Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). Civil penalties, as an alternative to an injunction, would continue to be available unless it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66.

The court of appeals accordingly erred in inferring from the district court's decision to limit petitioners' relief to civil penalties that petitioners' suit was moot. If this case were truly like *Steel Co.*, and petitioners had brought suit simply to seek imposition of civil penalties for past violations, then they would lack standing, because punishing pre-complaint conduct, discontinued before the suit began, would not redress any cognizable injury to petitioners that could provide the basis for the suit. See 523 U.S. at 106. But this case differs crucially from *Steel Co.* because petitioners brought suit to abate Laidlaw's ongoing environmental violations, Laidlaw was in a state of non-compliance

when the suit was filed, Laidlaw failed to demonstrate that its voluntary cessation had left no reasonable prospect of future violations, and petitioners were therefore entitled to seek a remedy that would adequately ensure future compliance. The civil penalties, which the court expressly levied to deter future violations, were an appropriate judicial means to that end. Cf. *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987).

Here, unlike the situation in *Steel Co.*, petitioners had more than merely a "generalized interest in deterrence." 523 U.S. at 108. Instead, petitioners had the same Article III interest as one who seeks an injunction or declaratory judgment to curtail "a continuing violation or the imminence of a future violation." *Ibid.* Petitioners sought to deter violations that caused them, and would in the future cause them, injury in fact. See *Hewitt*, 482 U.S. at 761 ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'cause or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*."). The relief the district court awarded—civil penalties calibrated to "provide adequate deterrence under the circumstances of this case" (*Laidlaw II*, 956 F. Supp. at 611 (J.A. 182))—was designed to redress that specific interest by compelling compliance. Petitioners accordingly had the requisite adversarial posture, arising from their concrete interest in abating those violations, to satisfy the requirements of Article III. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).[8]

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[8] In its brief in opposition, Laidlaw indicated that it closed the facility after the district court assessed civil penalties. Br. in Opp. 1 n.1. We note that Laidlaw's decision to close the facility after receiving a penalty assessment designed to deter future violations

D. The Court of Appeals' Judgment Should Be Vacated And The Case Remanded For Further Proceedings, Including Appropriate Proceedings Respecting Petitioners' Entitlement To Litigation Costs

For the foregoing reasons, we submit that the court of appeals erred in concluding that the district court's determination not to award injunctive relief rendered this case moot. If the Court agrees, then there will be no occasion to reach the question whether citizens may recover litigation costs if the citizen action becomes moot as a consequence of the defendant's cessation of its unlawful conduct. Under this Court's normal practice, the case will be remanded for resolution of the remaining issues that the court of appeals did not reach, including the question of petitioners' standing.

The question of attorneys' fees can be addressed once the litigation has run its course. We nevertheless observe that there is good reason to question the court of appeals' dictum that "[petitioners'] failure to obtain relief on the merits of their claim precludes any recovery of attorneys' fees or litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" Pet. App. 9a n.5. This Court indicated in *Gwaltney* that citizens would be entitled to recover litigation costs for suits that "result in successful abatement but do not reach a verdict." 484 U.S. at 67 n.6 (quoting S. Rep. No. 414, 92 Cong., 2d Sess. 81 (1971)). At the time of that suit, Section 505(d) of the Clean Water Act authorized courts to award

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would not provide a basis for setting aside the civil penalty assessment as moot. Cf. *United States Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1994) ("The judgment is not unreviewable, but simply unreviewed by [the losing party's] own choice.").

attorneys' fees "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d) (1982). Congress has since revised Section 505(d) to allow an award of litigation costs "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. 1365(d). The amendment, which prohibits a court from awarding fees to a losing party, does not appear to restrict the court's power to award fees to a citizen who can show that the suit prompted the defendant to come into compliance.

The Court has previously indicated, in connection with other federal statutes that authorize "prevailing parties" to recover attorneys' fees, that a plaintiff whose suit induces the defendant to comply with the law voluntarily is a "prevailing party." For example, the Court stated in *Hewitt*, *supra*, a case arising under 42 U.S.C. 1983, that "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under [42 U.S.C.] 1988." 482 U.S. at 760. The Court explained:

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id. at 760-761. See also *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980) ("for purposes of the award of counsel fees [under 42 U.S.C. 1988], parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief")

(quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).

The Court's decision in *Farrar* v. *Hobby*, 506 U.S. 103 (1992), which states that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim," *id.* at 111, does not repudiate the reasoning in *Hewitt* and *Maher*. A plaintiff prevails on the "merits of his claim" if a court finds that the defendant, in direct response to the plaintiff's suit, has altered his behavior in a way that renders the claim moot as a matter of law. See *Hewitt*, 482 U.S. at 761 ("In all civil litigation, the judicial decree is not the end but the means.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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